United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

CERTIFICATE OF SERVICE ATTACHED

76-7588

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

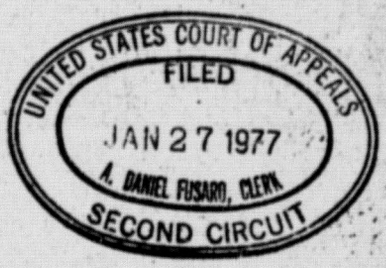
GAYLE MCQUOID HOLLEY, individually and on behalf of JAMES MCQUOID, NORMAN MCQUOID, THOMAS MCQUOID, DOUGLAS MCQUOID, MICHAEL MCQUOID, and ADELAINE MCQUOID, her minor children,

Plaintiff-Appellant,

-vs-

ABE LAVINE, as Commissioner of the New York State Department of Social Services, and JAMES REED, as Commissioner of the Monroe County Department of Social Services,

Defendants-Appellees.



ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

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POINT I

THE PLAINTIFF IS ELIGIBLE FOR AN A.F.D.C. GRANT UNDER FEDERAL REGULATIONS

In response to the plaintiff's claim that New York Social Services Law §131-k operates to deny benefits to persons eligible under federal regulations, the defendants argue primarily that the plaintiff does not meet the standards promulgated by H.E.W. The plaintiff concedes that her standing to challenge the conflict between the state statute and the federal regulations must rest upon her eligibility under the federal standard.*

The defendants allege that the plaintiff's residence in this county is neither "permanent" nor "under color of law" as required by 45 C.F.R. §233.50. That her present residence here is "permanent" within the meaning of the immigration laws is made clear by the provisions of 8 U.S.C. §1101(a)(31), as was noted in our main brief at page 8, n.

The meaning of the "under color of law" language is subject to a wider range of interpretation. The defendant state commissioner asserts that the language has a very narrowly defined meaning, deriving from a Senate report supporting legislation never enacted. Brief of appellee Lavine, pages 20 ff. The restrictive

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* Standing to challenge the conflict arising out of the requirements of the Social Security Act itself rests, of course, upon eligibility under those provisions and is unrelated to the provisions of any H.E.W. regulations which might be inconsistent with the Act.

definition suggested in Senate Report No. 92-1230, i.e. "a person who entered the United States before July, 1948 and who may be eligible for admission for permanent residence at the discretion of the Attorney General under section 1259 of Title 8 of the United States Code," has been rejected by H.E.W. Its definition in 45 C.F.R. 233.50 specifically includes parolees and refugees, persons not covered by 8 U.S.C. §1259. In addition, the defendant state Commissioner has also rejected such a narrow construction by permitting the inclusion of parolees and refugees to qualify under §131-k.*

Inasmuch as the H.E.W. regulations at issue here were intended to be consistent with the congressional intent expressed in the S.S.I. legislation, specifically 42 U.S.C. §1382-c(a)(1)(B) which also contains "under color of law" language, it is important to note H.E.W.'s regulatory interpretation of that language. Under current S.S.I. regulations, evidence of permanent residence under color of law may consist either of an I.N.S. form I-94 indicating parolee or refugee status, or documentation "in the form of correspondence from the Immigration and Naturalization Service stating the applicant has been granted indefinite voluntary departure or an indefinite stay of deportation." 20 C.F.R. §416.204(a)(3).**

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* Note the provisions of defendant Lavine's Administrative Letter 74 ADM-110 dated August 1, 1974, at page 4 [67], permitting evidence of such status to qualify as evidence of permanent residence under color of law.

** The "voluntary departure" procedure referred to here is a well recognized alternative to a deportation order and may be used even prior to the institution of any deportation proceedings. See Gordon (footnote cont'd on page 3).

The letter of I.N.S. District Director Bertness of October 16, 1974, [13] clearly indicates his exercise of discretion in granting an indefinite voluntary departure to the plaintiff and would be sufficient to establish her presence under color of law for the purposes of the S.S.I. regulations.

Inasmuch as the A.F.D.C. regulation contains no contrary directions and was expressly intended to comport with the S.S.I. legislation, there is no ground for asserting that the plaintiff has not established residence "under color of law" for A.F.D.C. purposes as well. Immigration officials are fully aware of the plaintiff's residence and her circumstances and have exercised the discretion granted them under the immigration statutes to permit her continued residence within the United States.* It would seem clear from the language of §233.50 and its inclusion of two specific groups who remain in the United States at the discretion of immigration officials, that H.E.W. views the Social Security Act as requiring that A.F.D.C. benefits be extended to persons

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(footnote ** cont'd from page 2).

and Rosenfield, Immigration Law and Procedure (Matthew Bender 1973), §7.2(b) p. 7-13. The indefinite voluntary departure is often permitted, as a matter of discretion, to Western Hemisphere relatives of American citizens or of lawfully admitted aliens "in order to permit them to remain indefinitely in the United States with their families." Ibid., 1973 cumulative supplement, page 6.

* The defendant county commissioner's argument that the lack of documentary evidence required by defendant Lavine's Administrative Letter renders the plaintiff clearly ineligible only serves to further exemplify the conflict between the state and federal requirements.

in the plaintiff's circumstances, as long as they are otherwise eligible. For New York State to disqualify such persons is clearly unlawful. Schneider v. Whaley, 541 F.2d 916 (2nd Cir. 1976).

POINT II

NEW YORK MAY NOT FRUSTRATE THE DIRECTIONS OF THE CONGRESS REGARDING GRANTS TO CARE TAKER RELATIVES OF A.F.D.C. ELIGIBLE CHILDREN

The defendants' assertion that the Congress has implicitly authorized the denial of aid to alien "caretakers" both imposes too much interpretation on congressional silence and ignores the true nature of the caretaker portion of the A.F.D.C. payment. Defendant Lavine's reading of the omission of language in 42 U.S.C. §602(b) similar to that found in §§302(b), 1202(b) and 1382(b) prohibiting state imposed citizenship requirements would require the unseemly conclusion that the Congress intended to permit states to deny aid to non-citizen children but not to the non-citizen aged. Whatever the reason behind this omission, it constitutes less than a "congressional authorization for the exclusion [of non-citizens] clearly evidenced from the Social Security Act or its legislative history." Townsend v. Swank, 404 U.S. 287, at 287 (1971).

The resolution of the issues in this case does not depend, however, on what the Congress may or may not have intended in omitting the "citizenship requirement" language from §602(b). This case does not raise the question of the A.F.D.C. eligibility of a family of deportable aliens, nor of the eligibility of any deportable child. Rather, it puts at issue whether the Congress has clearly authorized the states to reduce the grant given to concededly eligible families because the person caring for the eligible

children is not lawfully residing within the United States. It is clear that the Congress has made no specific provision permitting such an exclusion. Moreover, the language of §602(b) in which defendant Lavine seeks support, specifically requires the approval only of state plans which comply with the requirements of §602(a). Subdivision (10) of that subsection requires that a state plan must provide that "aid to families with dependent children" be furnished to "all eligible individuals." 42 U.S.C. §602(a)(10). As was discussed in our main brief, at pages 9-14, the statutory definition of "aid to families with dependent children" includes aid provided "to meet the needs of the relative with whom any dependent child is living." 42 U.S.C. §606(b)(1). In the present case it is the citizen children of the plaintiff who are the "eligible individuals" within the meaning of §602(a)(10) and the actions of the defendants, pursuant to state law, have deprived these eligible individuals of the full benefits to which they are entitled under the Social Security Act. See Lopez v. Vowell, 471 F.2d 690 (5th Cir. 1973), cert. den. 411 U.S. 939 (1973).

In response to the defendant county commissioner's reliance on New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973), and Doe v. Maher, 414 F.Supp. 1368 (D. Conn. 1976), it need only be observed that this case involves state actions which are directly contrary to federal law and not merely issues of whether the federal government has pre-empted all state action in this field. Here there is "a conflict of substance as to eligi-

bility provisions, [in which] the federal law of course must control." New York State Department of Social Services v. Dublino, supra, at 415. See also, DeCanas v. Bica, 96 S.Ct. 933, 937 (1976) where the Supreme Court reminds that "even state regulation designed to protect vital state interests must give way to paramount federal legislation." No more persuasive is defendant Lavine's insistence that the assumptions expressed in Mathews v. Diaz, 96 S.Ct. 1883 (1976), at page 1893, constitute a final interpretation of congressional intent for the purposes considered here. The Congress has clearly directed that A.F.D.C. eligible children be provided with collateral support to maintain their caretaker and it has placed no restrictions on that caretaker regarding his or her alien status. Accordingly, New York is prohibited from doing so and the action of its officials challenged here must be reversed.

POINT III

ATTORNEY'S FEES MAY BE AWARDED RETROACTIVELY UNDER THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976

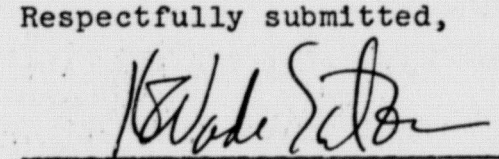
This case was initiated prior to the Supreme Court's decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), in which the Court ruled that, absent extraordinary circumstances, specific statutory authorization would be required to support an award of attorney's fees to the prevailing party in federal litigation. Subsequently the Congress enacted specific legislation providing for an award of such fees in actions arising under 42 U.S.C. §1983, among others. 42 U.S.C. §1988, P.L. 94-559. The legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 clearly indicates that its provisions are intended to have retroactive effect, at least as to actions pending at the time of its becoming laws. Wade v. Mississippi Cooperative Extension Service, ____ F.Supp. ____, 45 L.W. 2301 (N.D. Miss. December 14, 1976); House Report No. 94-1558, n.6; see also Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974). Accordingly, the district court should be directed to consider, or remand, the propriety and amount of attorney's fees to be awarded.

CONCLUSION

For the foregoing reasons the judgment of the district court should be reversed and this matter remanded for entry of summary judgment in favor of the plaintiff.

Dated: January 24, 1977

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned attorney for the plaintiff-appellant in this appeal hereby certifies that on the 24th day of January, 1977, he served the within Reply Brief upon counsel for the defendants-appellees by depositing 2 copies of said document, enclosed in a postpaid wrapper addressed to Alan W. Rubenstein, Assistant Attorney General, The Capitol, Albany, New York 12224, and Charles G. Porreca, Esq., Monroe County Department of Social Services, 111 Westfall Road, Rochester, New York 14620, the addresses designated by said attorneys for that purpose, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Dated: January 24, 1977

K. WADE EATON, ESQ.